

DISCOVERY OF PSYCHOTHERAPIST-PATIENT COMMUNICATIONS AFTER *TARASOFF*

In Tarasoff v. Regents of the University of California the California Supreme Court created a bifurcated cause of action. Under the "should have" branch of the Tarasoff holding a peculiar set of discovery problems arise. This Comment discusses several currently available procedural devices which may help resolve these problems. It points out the need for a more refined and discriminating process for handling discovery of putatively privileged therapist-patient communications. Finally, it suggests a procedure, based on existing California statutory and case law, which will effectuate the Tarasoff cause of action while protecting legitimate interests of therapist-patient confidentiality.

INTRODUCTION

In *Tarasoff v. Regents of the University of California*¹ the California Supreme Court created a duty and a cause of action previously unrecognized in California.² The court ruled that

[w]hen a therapist³ determines, or pursuant to the standards of his profession should determine, that his patient⁴ presents a serious dan-

1. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

2. *Id.* at 433-39, 551 P.2d at 342-46, 131 Cal. Rptr. at 21-26. *See also* Annot., 10 A.L.R.3d 619 (1966).

3. The court treats the term *therapist* as synonymous with the word *psychotherapist*; therefore, this Comment will use these terms interchangeably. The use of these words in the context of the *Tarasoff* opinion is impliedly limited to psychiatrists and psychologists. 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25. *But see* CAL. EVID. CODE § 1010(c)-(e) (West Supp. 1977), (also includes as *psychotherapists* for the purpose of privileged communications licensed clinical social workers, school psychologists, and marriage, family, and child counselors); 49 OP. CAL. ATT'Y GEN. 104 (1967) (concludes that the use of the term *psychotherapist* by marriage, family, and child counselors is not proscribed by statute).

4. CAL. EVID. CODE § 1011 (West 1966) defines *patient* as a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preven-

ger of violence to another,⁵ he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty . . . may call for [the therapist] to warn the intended victim . . . or to take whatever other steps are reasonably necessary under the circumstances.⁶

Vigorous dissent accompanied the majority opinion,⁷ and profuse academic comment followed.⁸

tive, palliative, or curative treatment of his mental or emotional condition or who submits to an examination of his mental or emotional condition for the purpose of scientific research on mental or emotional problems.

5. The threatened person must be the foreseeable victim of danger. The court refused to hold that the warning must be given only when the therapist actually knows the identity of the threatened victim, 17 Cal. 3d at 439 n.11, 551 P.2d at 345 n.11, 131 Cal. Rptr. at 25 n.11, but spoke in terms of persons "readily identifiable" by the therapist. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21. In delineating this duty within a duty to identify the threatened person, the court established vague maximum and minimum standards regarding the extent to which a therapist must inquire into a threatened victim's identity, but it avoided any "hard and fast rule." Although recognizing that "in some cases it would be unreasonable to require the therapist to interrogate his patient to discover the victim's identity or to conduct an independent investigation," the court also noted other cases where "a moment's reflection will reveal the victim's identity." In what cases it would not be unreasonable to require an interrogation or investigation and how long a "moment's reflection" is, are questions the answers to which will depend on the circumstances of each case. *Id.* at 439 n.11, 551 P.2d at 435 n.11, 131 Cal. Rptr. at 25 n.11 (emphasis added).

6. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

7. Justice Mosk concurred and dissented; Justice Clark, with whom Justice McComb concurred, dissented.

8. Ayres & Holbrook, *Law, Psychotherapy, and the Duty to Warn: A Tragic Trilogy?*, 27 BAYLOR L. REV. 677 (1975); Schindler, *Malpractice—Another Dimension of Liability—A Critical Analysis*, 20 TRIAL LAW. GUIDE 129 (1976); Stone, *The Tarasoff Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976); Comment, *Psychotherapist-Patient Privilege—Patient's Dangerous Condition—Confidentiality—Legal Duty to Warn Potential Victim*, 9 AKRON L. REV. 191 (1976); Comment, *Psychiatry—Torts—A Psychotherapist Who Knows Or Should Know His Patient Intends Violence to Another Incurs a Duty to Warn*, 7 CUM. L. REV. 551 (1977); Comment, *Tarasoff v. Regents of the University of California: Psychotherapists, Policemen, and the Duty to Warn—An Unreasonable Extension of the Common Law?*, 6 GOLDEN GATE L. REV. 229 (1975); Comment, *Cause of Action Can Be Stated Against Psychotherapist Employed by University Hospital, and Against Campus Police for Breach of Duty to Warn Victim of Peril from Patient as Disclosed by Patient's Communications*, 12 HOUS. L. REV. 986 (1975); Note, *The Dangerous Psychiatric Patient—The Doctor's Duty to Warn*, 10 LAND & WATER L. REV. 593 (1975); Comment, *Physicians and Surgeons—Negligence—Psychotherapist Has a Duty to Warn an Endangered Victim Whose Peril Was Disclosed to Psychotherapist by Patient*, 53 N.D.L. REV. 279 (1976); Comment, *Tarasoff and the Psychotherapist's Duty to Warn*, 12 SAN DIEGO L. REV. 932 (1975); Note, *Duty Imposed on Psychotherapists to Exercise Reasonable Care to Warn Potential Victims of Foreseeable Imminent Danger Posed by Mentally Ill Patients*, 6 SETON HALL L. REV. 536 (1975); Comment, *The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent*, 9 U.C.D.L. REV. 549 (1976); Comment, *Confidential Communications—Privileged Communications—Psychiatry—Psychotherapist Has a Duty to Warn an Endangered Victim Whose Peril Was Disclosed by Communications Between*

One practical inquiry that must be made regarding *Tarasoff* is the following: Assume that a person is battered and seriously injured by another who is later discovered to be, or to have been,⁹ a patient in psychotherapy. Possible defendants are the assailant, and in California after *Tarasoff*, the assailant's psychotherapist.¹⁰ If the plaintiff alleges in a suit against the therapist that the latter *should have* determined that his patient was dangerous, how will the plaintiff prove his case? Any attempt to discover probative information in defendant-therapist's control will be met by a refusal to permit

the Psychotherapist and His Patient, 44 U. CIN. L. REV. 368 (1975); Note, *Imposing a Duty to Warn on Psychiatrists—A Judicial Threat to the Psychiatric Profession*, 48 U. COLO. L. REV. 283 (1977); Note, *Psychiatrist's Duty to the Public: Protection From Dangerous Patients*, 1976 U. ILL. L.F. 1103; Comment, *Tarasoff v. Regents of the University of California: The Psychotherapist's Peril*, 37 U. PITT. L. REV. 155 (1976); Comment, *Risk Allocation in Mental Health Care: Whether to Treat the Patient or His Victim*, 1975 UTAH L. REV. 553; Comment, *Liability of Psychotherapist for Failure to Warn of Homicide by Patient*, 28 VAND. L. REV. 631 (1975); Comment, *Tort Law: California's Expansion of the Duty to Warn*, 15 WASHBURN L.J. 496 (1976).

9. The assailant need not still be a patient at the time of the attack on the plaintiff. The length of time between an alleged negligent failure to ascertain dangerousness and a subsequent injury will bear on the issues of foreseeability and proximate cause. Two months elapsed between Prosenjit Poddar's threat against Ms. Tarasoff and the killing. Poddar did not attend therapy during this time. The court did not address this point. For the facts of the *Tarasoff* case see *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).

10. It has been asserted that "circumstances under which the 'duty to warn' might arise [will] be extremely rare." Ayres & Holbrook, *Law, Psychotherapy, and the Duty to Warn: A Tragic Trilogy?*, 27 BAYLOR L. REV. 677, 703 (1975). This prediction may be true. It is certain, however, that circumstances in which it is alleged that a duty to warn had arisen will be less rare and will be, perhaps, quite frequent. Every time a person is assailed by another who is, or was, a patient in psychotherapy, the essential ingredients exist for a malpractice suit under *Tarasoff*. Actually, the plaintiff need know only the fact of his assailant's psychotherapy and the name of the therapist in order to file his complaint. It is conceivable, however, under California's "John Doe" procedure, that the plaintiff in a civil action against an assailant could join a John Doe defendant-therapist without any certainty that the assailant was ever a patient in psychotherapy. See CAL. CIV. PROC. CODE § 474 (West Supp. 1977). See generally Comment, *Suing Parties Defendant by Fictitious Names*, 22 CALIF. L. REV. 685 (1934); Note, *Designation of Defendants by Fictitious Names—Use of the John Doe Complaint*, 46 IOWA L. REV. 773 (1961).

The actual merit of the plaintiff's claim and his likelihood of prevailing at trial will not be critical factors in his determination to initiate malpractice litigation against his assailant's therapist. Indeed, in light of the informational and discovery difficulties of the *Tarasoff* plaintiff's position, in many cases the plaintiff will be unaware of the actual merit of his claim. More likely, the factors bearing on the plaintiff's decision to sue the therapist will be the seriousness of the injury sustained, the ability or inability to extract a satisfactory damage award from a possibly indigent assailant, and the presence of an insured defendant-therapist.

discovery of privileged therapist-patient communications.¹¹ *Tarasoff* is inapposite as precedent because there defendant-therapists had in fact predicted violence by the patient. The *Tarasoff* court ruled that the dangerous-patient exception obviated the therapist-patient privilege.¹² In cases brought under the "should have" tenet of the *Tarasoff* holding, however, the applicability of the dangerous-patient exception is at issue during pre-trial discovery.¹³

THE PROBLEM

Discovery difficulties will arise in some cases brought under the new *Tarasoff* cause of action for two reasons. First, the *Tarasoff* holding is broader than the facts of the case. Second, the court draws a misleading analogy between *Tarasoff*-type situations and medical malpractice cases.

The Scope of the Tarasoff Holding

Tarasoff holds that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."¹⁴ The scope of the duty is not restricted to facts similar to those of the *Tarasoff* case. In *Tarasoff* the defendant-therapists actually determined that the patient was dangerous.¹⁵ However, the *Tarasoff* holding also includes situations in which a therapist should have predicted dangerousness but did not.

The differences between these two situations are significant for a plaintiff attempting to discover information in defendant-therapist's control. In *Tarasoff* and other cases in which the defendant-therapist actually predicts violence toward a foreseeable victim, the issue of privileged communication does not arise. The dangerous-patient exception to the therapist-patient privilege provides that "[t]here is no privilege . . . if the psychotherapist has reasonable cause to believe that his patient is . . . dangerous"¹⁶ However, if the plaintiff

11. The comment to the 1965 Evidence Code, CAL. EVID. CODE § 1014 comment (3) (West 1966) (current version at CAL. EVID. CODE § 1014 (West Supp. 1977)), states that the therapist-patient privilege is applicable to civil actions for damages arising from the patient's criminal conduct. The therapist is required to claim the privilege. *Id.* § 1015.

12. 17 Cal. 3d at 440-42, 551 P.2d at 346-48, 131 Cal. Rptr. at 26-28. See generally Comment, *The Dangerous Patient Exception and the Duty to Warn: Creation of a Dangerous Precedent*, 9 U.C.D.L. REV. 549, 557 (1976).

13. See note 17 *infra*.

14. 17 Cal. 3d at 439, 551 P.2d at 345, 131 Cal. Rptr. at 25 (emphasis added).

15. *Id.* at 432, 551 P.2d at 341, 131 Cal. Rptr. at 21.

16. CAL. EVID. CODE § 1024 (West 1966).

alleges that his assailant's therapist should have determined that his patient was dangerous but did not, the applicability of the dangerous-patient exception will be in dispute. The defendant-therapist will certainly contend that he did not have reasonable cause to believe his patient dangerous and therefore the exception does not apply. To admit the applicability of the dangerous-patient exception would be tantamount to admitting the essential elements of the plaintiff's cause of action.¹⁷

In situations where the defendant-therapist denies the applicability of the dangerous-patient exception and objects to the plaintiff's attempt to discover therapist-patient communications,¹⁸ *Tarasoff* is of little value as precedent. An actual determination of dangerousness was made in *Tarasoff*. Neither the facts of *Tarasoff* nor the majority opinion provide a guide for resolving the disputed privilege issue in cases in which the plaintiff alleges that the defendant-therapist should have predicted violence.¹⁹

17. The dangerous-patient exception will apply if defendant-therapist had reasonable cause to believe his patient dangerous and if disclosure was necessary to prevent threatened danger. CAL. EVID. CODE § 1024 (West 1966). To state a *Tarasoff* cause of action, the plaintiff must show 1) that defendant-therapist did, or under applicable professional standards should have determined that his patient posed a serious danger of violence; 2) that plaintiff was the foreseeable victim of that violence; 3) that therefore defendant-therapist had a duty of reasonable care to protect plaintiff; 4) that defendant-therapist's conduct fell below the standard of reasonable care; and 5) that defendant-therapist's failure to exercise reasonable care proximately resulted in plaintiff's injury. 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

The parallel between the dangerous-patient exception and the first two elements of the *Tarasoff* cause of action is apparent. For the defendant-therapist to admit the applicability of the exception would be to admit the essential elements of plaintiff's cause of action.

The problem addressed here may also arise when the plaintiff alleges that the defendant-therapist did in fact predict dangerousness, although the procedural difficulties are not as complex as when the plaintiff alleges that the defendant-therapist should have predicted dangerousness. In situations where there was an actual prediction of dangerousness the defendant-therapist may still deny the applicability of the dangerous-patient exception on the ground that the plaintiff was not a foreseeable victim. The foreseeability issue will then have to be decided at a proceeding like the one suggested in this Comment. If the plaintiff alleges that the defendant-therapist should have predicted dangerousness, the far more complicated issue of whether defendant-therapist had reasonable cause to make such a prediction must also be decided. See notes 87-99 and accompanying text *infra*.

18. Privileged communications are not subject to discovery. Rudnick v. Superior Court, 11 Cal. 3d 924, 929, 523 P.2d 643, 647, 114 Cal. Rptr. 603, 607 (1974); CAL. CIV. PROC. CODE §§ 2016, 2030, 2031, 2033 (West Supp. 1977).

19. See 17 Cal. 3d at 451, 551 P.2d at 353, 131 Cal. Rptr. at 33 (Mosk, J., dissenting).

It is easy to liken *Tarasoff* to a medical malpractice case. A psychotherapist²⁰ is a medical doctor if he is a psychiatrist. A clinical psychologist is viewed as a quasi-medical professional often referred to as "doctor" by colleagues and patients. The *Tarasoff* court analogized the psychotherapist to the regular physician:

The role of the psychiatrist, who is indeed a practitioner of medicine, and that of a psychologist who performs an allied function, are like that of the physician who must conform to the standards of the profession and who must often make diagnoses and predictions based upon such evaluations. Thus the judgment of the therapist in diagnosing emotional disorders and in predicting whether a patient presents a serious danger of violence is comparable to the judgment which doctors and professionals must regularly render under accepted rules of responsibility.²¹

The court carried the psychotherapist-physician analogy further by applying the usual comparative standard of medical negligence in *Tarasoff*-type cases. The court held that in determining whether his patient poses a serious danger of violence a therapist must exercise "that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of that professional specialty under similar circumstances."²²

Ordinary medical malpractice cases and cases arising under the *Tarasoff* cause of action differ, however, in one critical respect. A medical malpractice suit against the physician is usually brought by his patient.²³ Malpractice action against the therapist under *Tarasoff* will never be brought by the patient.²⁴ The importance of this difference lies not only in the respective plaintiffs' firsthand knowledge of defendants' allegedly negligent conduct, but also in the plaintiffs' ability to discover probative information in the defendants' control.

The plaintiff in the usual medical malpractice case has little difficulty evidencing the defendant-physician's conduct.²⁵ He often has

20. *Psychotherapist* is defined in note 3 *supra*.

21. 17 Cal. 3d at 438, 551 P.2d at 345, 131 Cal. Rptr. at 25.

22. *Id.*

23. *But see, e.g.,* Hofmann v. Blackmon, 241 So. 2d 752 (Fla. Dist. Ct. App. 1970), in which a suit was brought by the plaintiff who contracted disease from a patient of the defendant-physician as a result of the latter's negligent failure to diagnose. This genre of suits by third parties would seem to constitute an extremely small fraction of medical malpractice claims. *See generally* C. STETLER & A. MORITZ, DOCTOR AND PATIENT AND THE LAW 363-75 (4th ed. 1962).

24. Although the *Tarasoff* duty *per se* seems to be limited to third persons, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20, it is conceivable that a patient might kill his spouse or parent and sue the therapist under *Tarasoff* for wrongful death. *See generally* CAL. CIV. PROC. CODE § 337 (West Supp. 1977).

25. The patient-plaintiff's problem has traditionally been obtaining expert testimony to establish customary practice for comparison with the defendant-physician's conduct. *See Huffman v. Lindquist*, 37 Cal. 2d 465, 480, 234 P.2d 34,

personal knowledge of relevant events. Furthermore, the defendant-physician is subject to the patient-plaintiff's discovery. Discovery is not hampered by the privileged communication objection. The patient-plaintiff is the holder of the privilege²⁶ and may waive it at any time.²⁷ Moreover, any obstacle to discovery is obviated by the patient-plaintiff tendering his physical condition into issue.²⁸

The *Tarasoff* plaintiff, on the other hand, is outside the psychotherapist-patient privilege. He will have no first hand knowledge of what transpired between the defendant-therapist and the patient-assailant during therapy. His discovery will not reach privileged communication.²⁹ As a defendant, the therapist may not assert the psychotherapist-patient privilege in his own behalf.³⁰ However, the therapist has an affirmative obligation to protect the patient's privacy by resisting the non-patient plaintiff's attempt to discover therapist-patient communications.³¹ To the extent that the defendant-therapist's interest in obstructing discovery coincides with the patient's privacy interest, the *Tarasoff* plaintiff may be frustrated in his attempt to acquire information in the defendant-therapist's control which would tend to prove negligence.³²

THEORIES FOR OVERCOMING THE *TARASOFF* PLAINTIFF'S DISCOVERY DIFFICULTIES

A *Tarasoff* plaintiff might utilize several theories to overcome a defendant-therapist's invocation of the therapist-patient privilege. The privilege belongs to the patient, not to the therapist.³³ The purpose of the privilege is to avoid the humiliation of the patient that

44 (1951) (Carter, J., dissenting); Markus, *Conspiracy of Silence*, 14 CLEV.-MAR. L. REV. 520 (1965).

26. CAL. EVID. CODE § 993 (West 1966).

27. *Id.* § 912.

28. *Id.* § 996.

29. See note 18 *supra*.

30. Cf. *Roberts v. Superior Court*, 9 Cal. 3d 330, 341, 508 P.2d 309, 316, 107 Cal. Rptr. 309, 316 (1973) (therapist-patient privilege is that of the patient and not that of the therapist).

31. CAL. EVID. CODE § 1015 (West 1966).

32. The provisions of the California Evidence Code relating to privileges are applicable in all proceedings in which testimony can be compelled. *Id.* §§ 901, 910. Any information that would be privileged at trial is also privileged for the purpose of discovery. *Crest Catering Co. v. Superior Court*, 62 Cal. 2d 274, 277, 398 P.2d 150, 152, 42 Cal. Rptr. 110, 112 (1965).

33. *Roberts v. Superior Court*, 9 Cal. 3d 330, 341, 508 P.2d 309, 316, 107 Cal. Rptr. 309, 316 (1973).

might accompany disclosure of his illness.³⁴ Thus, a therapist may not assert the privilege if it has been waived by the patient or if the communication falls within one of the statutory exceptions.³⁵ In addition to waiver under California Evidence Code section 912, three exceptions are apposite here: section 1016 (the patient-litigant exception), section 1020 (the breach of duty exception), and section 1024 (the dangerous-patient exception).

Section 912: Waiver

California Evidence Code section 912³⁶ provides for waiver of the therapist-patient privilege if the holder³⁷ voluntarily discloses a significant part of the privileged communication. The patient, plaintiff's assailant, may cooperate with the plaintiff in a suit against the therapist, but that is a dubious assumption.³⁸ If the patient is unwilling to assist the plaintiff but nevertheless discloses a significant part of the therapist-patient communication, the privilege is waived.³⁹ However, the admission by the patient of the mere fact or purpose of his psychotherapy is insufficient to constitute waiver.⁴⁰ Disclosure of a significant part of the *substance* of the privileged communication is required under section 912.⁴¹

The privilege is also waived under section 912 if the patient consents to a third party's disclosure.⁴² Consent may be "manifested by any statement or other conduct of the holder . . . including his failure to claim the privilege in any proceeding in which he has the

34. *In re Lifschutz*, 2 Cal. 3d 415, 434, 467 P.2d 557, 569, 85 Cal. Rptr. 829, 841 (1970).

35. *Id.* at 430, 467 P.2d at 566, 85 Cal. Rptr. at 838.

36. [T]he right of any person to claim a privilege provided by . . . Section 1014 (psychotherapist-patient privilege) . . . is waived with respect to a communication protected by such privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone.

CAL. EVID. CODE § 912 (West 1966).

37. The holder of the therapist-patient privilege is the patient, his guardian or conservator, or his personal representative if the patient is dead. *Id.* § 1013.

38. The presumably negative feelings harbored by the patient-assailant toward the plaintiff may be offset by countervailing negative feelings toward the therapist due to the psychoanalytic phenomenon of transference. See Comment, *The Liability of Psychiatrists for Malpractice*, 36 U. PITT. L. REV. 108, 122 (1974). Also, the assailant may waive the privilege as part of a settlement with the plaintiff. If a guardian, conservator, or personal representative has become the holder of the privilege, the obstacle of the patient-assailant's hostility toward the plaintiff may be diminished.

39. CAL. EVID. CODE § 912 (West 1966).

40. *Roberts v. Superior Court*, 9 Cal. 3d 330, 340, 508 P.2d 309, 315, 107 Cal. Rptr. 309, 315 (1973).

41. *People v. Perry*, 7 Cal. 3d 756, 783, 499 P.2d 129, 146, 103 Cal. Rptr. 161, 178 (1972). Disclosure that a particular matter was *not* discussed during psychotherapy will not constitute waiver. *Id.*

42. CAL. EVID. CODE § 912 (West 1966).

legal standing and opportunity to claim the privilege."⁴³ Plaintiff's discovery is such a proceeding.⁴⁴ Thus, a patient's knowledgeable failure to claim the privilege during the plaintiff's discovery directed at the patient might be considered waiver for the purpose of the plaintiff's subsequent discovery directed at the therapist.⁴⁵ The California Supreme Court has suggested that if the holder of a privilege remains silent when warned that disclosure of a privileged communication will be sought from another source, a waiver is effected.⁴⁶ This seems overbroad. The statutory language speaks of *consent* manifested by conduct. If no reason exists to infer that the holder's silence indicates consent, there would seem to be no ground for waiver. The courts have held that "it must clearly appear there is an intention to waive, and a court will not run to such a conclusion."⁴⁷

In summary, waiver under section 912 is available to the *Tarasoff* plaintiff to force discovery of communications claimed privileged by a defendant-therapist. Its applicability, however, is inconstant and uncertain. The plaintiff's access to probative information in the defendant-therapist's control depends entirely on the plaintiff's assailant. Cooperative waiver, waiver by disclosure of a significant part of the communication, and waiver by failure to assert the privilege require the voluntary or unwitting cooperation of the patient.

Section 1016: The Patient-Litigant Exception

A *Tarasoff* plaintiff might attempt to discover information in defendant-therapist's control by invoking the patient-litigant exception⁴⁸ to the psychotherapist-patient privilege. If the patient-assailant tenders his mental or emotional condition into issue in an action to which he is a party, he waives any privilege regarding relevant communications. In *In re Lifschutz*,⁴⁹ the California Supreme Court construed this exception "not as a complete waiver . . . but only as a

43. *Id.*

44. *Id.* § 901.

45. *But see* *People v. Kor*, 129 Cal. App. 2d 436, 443-44, 277 P.2d 94, 99 (1954).

46. *People v. Perry*, 7 Cal. 3d 756, 783, 499 P.2d 129, 146, 103 Cal. Rptr. 161, 178 (1972) (dictum).

47. *Torbensen v. Family Life Ins. Co.*, 163 Cal. App. 2d 401, 404, 329 P.2d 596, 597-98 (1958); *Newell v. Newell*, 146 Cal. App. 2d 166, 178, 303 P.2d 839, 847 (1956). *Accord*, *Elliot v. Watkins Trucking Co.*, 406 F.2d 90, 93-94 (1969).

48. "There is no privilege under this article as to a communication relevant to an issue concerning the mental or emotional condition of the patient if such issue has been tendered by the patient." CAL. EVID. CODE § 1016 (West 1966).

49. 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

limited waiver concomitant with the purposes of the exception.”⁵⁰ The *Lifschutz* court expressly identified two purposes for the exception:

First, the courts have noted that the patient, in raising the issue of a specific ailment or condition in litigation, in effect dispenses with the confidentiality of that ailment and may no longer justifiably seek protection from the humiliation of its exposure. Second, the exception represents a judgment that, in all fairness, a patient should not be permitted to establish a claim while simultaneously foreclosing inquiry into relevant matters.⁵¹

A third purpose was also suggested by the court: “In order to facilitate the ascertainment of truth and the just resolution of legal claims, the state clearly exerts a justifiable interest in requiring [disclosure of] communications, confidential or otherwise, relevant to pending litigation.”⁵²

The patient-litigant exception will not be available to the *Tarasoff* plaintiff in all situations. If the plaintiff never sues the patient-assailant or sues the therapist first, the exception will be unavailable in the action against the therapist.⁵³ However, additional possibilities exist: the plaintiff may join the patient and the therapist as defendants in a single suit, or the patient then the therapist may be sued separately.⁵⁴ These latter situations will be examined in light of the limitations placed on the patient-litigant exception by *Lifschutz*.

If the patient raises an issue concerning his mental condition⁵⁵ in a civil action in which he and the therapist are joined as defendants, the patient-litigant exception will probably be available for the plaintiff's use against the therapist. Such use of the exception seems

50. *Id.* at 435, 467 P.2d at 570, 85 Cal. Rptr. at 842.

51. *Id.* at 433, 467 P.2d at 569, 85 Cal. Rptr. at 841.

52. *Id.* at 425, 467 P.2d at 563, 85 Cal. Rptr. at 835.

53. In order to avoid a similar problem with former testimony in the physician-patient context, an exception was provided barring privilege in any action to recover damages for the criminal conduct of a patient. CAL. EVID. CODE § 999 (West Supp. 1977). The comment to § 999 before its 1975 amendment stated: “The admissibility of evidence should not depend on the order in which civil and criminal matters are tried. This exception is provided, therefore, so that the same evidence is admissible in the civil case without regard to when the criminal case is tried.” *Id.* comment (West 1966).

The therapist-patient privilege has no comparable exception. The comment to the 1975 amendment to § 999 notes that “the exception provided by section 999, like other exceptions in this article, does not apply to the therapist-patient privilege. . . . [T]he exceptions to that privilege are much more narrowly drawn.” *Id.* (West Supp. 1977).

54. The plaintiff might sue the patient then the therapist separately. More likely, where the plaintiff has sustained any substantial injury, a criminal action will result against the patient-assailant. The criminal case will almost certainly reach the courts before plaintiff's civil suit. *E.g.*, *People v. Poddar*, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974).

55. See generally *Carlton v. Superior Court*, 261 Cal. App. 2d 282, 289-90, 67 Cal. Rptr. 568, 573 (1968).

"concomitant with the purposes of the exception."⁵⁶ The patient dispenses with the confidentiality by raising the issue. Furthermore, the patient will not be permitted to claim a mental condition while foreclosing inquiry into the relevant matter of his communications with his therapist. Finally, the use of the exception in these cases is "to facilitate the ascertainment of truth and the just resolution of legal claims."⁵⁷

If the plaintiff sues the patient and then sues the therapist separately, the availability of the patient-litigant exception is doubtful. If the patient tenders an issue concerning his mental condition in the prior action, the question is raised: Are privileges that fall in one action pursuant to the patient-litigant exception considered to be fallen in a subsequent action to which the patient is not a party? The answer is not clear. Several courts have held that "once [a] privilege is waived it is gone for good."⁵⁸ If a patient calls his therapist as a witness and elicits from him a significant part of the therapist-patient communication, the privilege is waived under section 912 even in a separate action against the patient on an unrelated matter.⁵⁹ But if the patient merely tenders his mental condition into issue and the privilege falls pursuant to the patient-litigant exception, there is no reason to believe that the privilege will be eliminated for the purpose of a subsequent suit not involving the holder of the privilege.⁶⁰

Utilization of the patient-litigant exception by a *Tarasoff* plaintiff in a separate action against the therapist is not "concomitant with the purposes of the exception."⁶¹ Such use is not to prevent the patient from foreclosing inquiry into a claimed mental condition.

56. *In re Lifschutz*, 2 Cal. 3d 415, 435, 467 P.2d 557, 570, 85 Cal. Rptr. 829, 842 (1970).

57. *Id.* at 425, 467 P.2d at 563, 85 Cal. Rptr. at 835.

58. *Markwell v. Sykes*, 173 Cal. App. 2d 642, 648, 343 P.2d 769, 773 (1959). *Accord*, *Deacon v. Bryans*, 212 Cal. 87, 93, 298 P.2d 30, 32-33 (1931). In both of these cases the holder of the privilege was also a defendant in the subsequent suit.

59. *People v. Garaux*, 34 Cal. App. 3d 611, 613, 110 Cal. Rptr. 119, 120 (1973). In *Garaux*, the lawyer-client privilege was held to have been waived for the purpose of a subsequent suit where the client testified regarding the substance of the lawyer-client communication in a prior suit. *See also* *Stearns v. Los Angeles School Dist.*, 244 Cal. App. 2d 696, 723, 53 Cal. Rptr. 482, 500 (1966); *Agnew v. Superior Court*, 156 Cal. App. 2d 838, 840-41, 320 P.2d 158, 160 (1958). In both of these cases the holder of the privilege was also a party to the subsequent suit.

60. *See generally* Annot., 44 A.L.R.3d 1, 59 (1972).

61. *In re Lifschutz*, 2 Cal. 3d 415, 435, 467 P.2d 557, 570, 85 Cal. Rptr. 829, 842 (1970).

Although *Lifschutz* held that a patient dispenses with confidentiality by raising the issue, it is by no means clear that the court considered the dispensation to extend beyond the suit in which the issue was raised. The *Lifschutz* court saw the exception as "compel[ling] disclosure only in cases in which the patient's own action initiates the exposure . . . , [with] a patient's privacy remain[ing] essentially under the patient's control."⁶² The "gone for good" approach to waiver conflicts with the *Lifschutz* formulation of a limited inquiry. Unless the court emphasizes the exception's general purpose of "ascertainment of truth and . . . just resolution of legal claims"⁶³ it seems unlikely that the exception will be extended beyond the action in which it arises.

The patient-litigant exception may prove helpful to the *Tarasoff* plaintiff. However, it suffers from the same defect as waiver under section 912. The applicability of the patient-litigant exception in both instances is initiated by the patient. The uncertainty of its availability is compounded by its apparent inappropriateness in light of *Lifschutz*. Both section 912 and section 1016 are potentially useful to the *Tarasoff* plaintiff, but neither assures him access to the information essential to make his cause of action meaningful.

Section 1020: The Breach of Duty Exception

The breach of duty exception⁶⁴ was designed to apply in disputes between the therapist and the patient in which one charges the other with a breach of duty.⁶⁵ There are parallel exceptions to the physician-patient privilege (section 958) and the lawyer-client privilege (section 1001).⁶⁶ The Law Revision Commission's comment to section 958 applies to the breach of duty exception to the therapist-patient privilege as well as to the matching exceptions in the physician and lawyer contexts.⁶⁷ The comment states that one purpose of the exception is to prevent the patient or client from accusing the professional of a breach of duty and then invoking the privilege to obstruct the professional's defense.⁶⁸ The breach of duty exception therefore duplicates the patient-litigant exception to the therapist- and physician-patient privileges and in effect comprises a "client-litigant" exception to the lawyer-client privilege.

62. *Id.* at 433, 467 P.2d at 568, 85 Cal. Rptr. at 840.

63. *Id.* at 425, 467 P.2d at 563, 85 Cal. Rptr. at 835.

64. "There is no privilege under this article as to a communication relevant to an issue of breach, by the psychotherapist or by the patient, of a duty arising out of the psychotherapist-patient relationship." CAL. EVID. CODE § 1020 (West 1966).

65. See B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK 661 (1972).

66. CAL. EVID. CODE §§ 1001, 958 (West 1966).

67. *Id.* §§ 1001 comment, 1020 comment.

68. *Id.* § 958.

The Commission's comment states that another purpose of the exception is to prevent the patient or client from refusing to pay the professional's fee and then invoking the privilege to defeat a claim.⁶⁹ This objective seems to be the sole purpose of the exception in the context of the therapist- and physician-patient privileges. In any action by a patient against a therapist or physician for breach of duty, the patient can waive the privilege under section 912. However, the only duty generally owed by the *patient* is payment of the fee.⁷⁰ Thus, the only duty presently covered by the breach of duty exception to the therapist- and physician-patient privileges that is not also covered by another exception is the patient's duty to pay the fee.

No case has been reported in which the breach of duty exception has been utilized in the context of the therapist-patient privilege. However, this unused exception appears on its face to be apropos to the *Tarasoff* plaintiff's discovery purposes. Under section 1020 "[t]here is no privilege . . . as to a communication relevant to an issue of breach, by the psychotherapist . . . , of a duty arising out of the psychotherapist-patient relationship."⁷¹ Clearly, the therapist's new duty to third persons under *Tarasoff* arises out of the therapist-patient relationship. This duty is breached if the therapist negligently fails to determine that his patient poses a serious danger of violence. Ostensibly, if a *Tarasoff* plaintiff alleges such a breach of duty and shows that communications sought are relevant to his allegation, the privilege will fall under a literal reading of section 1020. Actually, it is certain that more should, and will be required.

It must be remembered that the confidentiality entailed in the therapist-patient privilege is highly regarded despite a deterioration of evidentiary privileges generally.⁷² An assurance of confidentiality has been acknowledged by the legislature and the courts as an essential element of successful psychotherapy.⁷³ The protection afforded the privilege has resulted in narrowly drawn and precisely construed exceptions.⁷⁴

69. *Id.*

70. *See id.*

71. *Id.* § 1020.

72. *In re Lifschutz*, 3 Cal. 3d 415, 434-35 n.20, 467 P.2d 557, 570 n.20, 85 Cal. Rptr. 829, 842 n.20 (1970). *See also* Louisell, *The Psychologist in Today's Legal World: Part II*, 41 MINN. L. REV. 731, 731-33 (1957).

73. *Tarasoff v. Regents of the Univ. of Cal.*, 17 Cal. 3d 425, 440, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976).

74. *See* CAL. EVID. CODE § 999 comment (West Supp. 1977). *See, e.g., id.* § 1016 (West 1966).

The utilization of the breach of duty exception in the *Tarasoff* framework would require an expansion of the purpose—if not the terms—of the exception. The duty contemplated by section 1020 before *Tarasoff* was owed only within the bounds of the professional relationship.⁷⁵ Under the statute as enacted, only the patient or the therapist may invoke the exception to defeat the privilege.⁷⁶ But in the *Tarasoff* context the issue is whether a third party has standing to utilize the exception.

In enacting section 1020, the legislature clearly envisioned only a duty owed by a therapist to a patient or by a patient to a therapist. The Law Revision Commission's comment states that "[t]he duty involved must, of course, be one arising out of the professional relationship."⁷⁷ The examples following this statement refer only to the two parties directly involved. Before *Tarasoff*, neither the therapist nor the patient owed any duty other than that owed to each other.⁷⁸ Thus, the narrow construction of exceptions to the therapist-patient privilege would seem to preclude any expansion of the exception to include third parties. Further, in keeping with the high protection given to the therapist-patient privilege, it is unlikely that a mere allegation of negligence by a third party will or should be sufficient to penetrate therapist-patient confidentiality. For these reasons, the breach of duty exception will probably be of no avail to the *Tarasoff* plaintiff.

Section 1024: The Dangerous-Patient Exception

The dangerous-patient exception⁷⁹ was used in *Tarasoff* to overcome defendant-therapists' privilege objections. In *Tarasoff* the therapists had in fact predicted violence toward a foreseeable victim. Consequently, the applicability of the exception was clear.⁸⁰ However, in cases arising under the "should have" tenet of the *Tarasoff* holding, the applicability of the exception is uncertain.

One problem regarding section 1024 is the apparent prospective and preventive nature of the exception vis-à-vis its retrospective application for discovery purposes under *Tarasoff*. The Law Revision

75. See *id.* § 958 comment. See also B. JEFFERSON, CALIFORNIA EVIDENCE BENCHMARK 661 (1972).

76. See CAL. EVID. CODE § 958 comment (West 1966).

77. *Id.*

78. See note 23 *supra*.

79. There is no privilege under this article if the psychotherapist has reasonable cause to believe that the patient is in such a mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure . . . is necessary to prevent the threatened danger.

CAL. EVID. CODE § 1024 (West 1966).

80. See note 17 and text accompanying notes 15-17 *supra*.

Commission's comment states that the purpose of section 1024 is to enable a therapist to take appropriate action if disclosure is necessary to prevent threatened harm.⁸¹ The preventive purpose of the exception is emphasized by the two prerequisites to its applicability. First, the therapist must have reasonable cause to believe the patient is dangerous. Second, disclosure must be necessary to prevent threatened danger.⁸²

In view of its prospective application, section 1024 would seem to be of questionable utility to the *Tarasoff* plaintiff seeking discovery after the harm has been done. The plaintiff may contend that the defendant-therapist's claim of privilege is inapposite because he had reasonable cause to believe his patient dangerous and disclosure was necessary to prevent harm. The defendant-therapist could logically counter that even if the plaintiff's contentions are true, disclosure *at this time* is not necessary to prevent harm. By emphasizing the preventive purpose of the exception and justifiably insisting on a narrow technical construction of the statutory language,⁸³ the defendant-therapist might argue that the exception was intended to avert harm, not to authorize intrusions into the confidentiality of psychotherapy for the purpose of a lawsuit. Precedent exists, however, for the retrospective application of section 1024.

In *People v. Hopkins*,⁸⁴ the defendant, after an assurance of confidentiality, told a therapist of his recent participation in certain violent crimes. The therapist subsequently sent the defendant, Hopkins, alone in a taxi to another branch of the hospital. There Hopkins repeated his story to two non-therapist nurses. They notified hospital security personnel who in turn notified the police. This information led to Hopkins' arrest and a confession which the defendant sought to suppress at trial as a privileged therapist-patient communication.⁸⁵ The appellate court held that even if Hopkins' arrest had resulted from a disclosure to the therapist, the trial court's denial of the motion to suppress was proper. In retrospect the court determined that Hopkins held no privilege:

81. CAL. EVID. CODE § 1024 comment (West 1966).

82. *Id.* § 1024.

83. See text accompanying note 74 *supra*.

84. 44 Cal. App. 3d 669, 119 Cal. Rptr. 61 (1975).

85. *Id.* at 673, 119 Cal. Rptr. at 63. The case as reported indicates that Hopkins sought to suppress his confession subsequent to arrest on the ground that it was a therapist-patient communication. It is difficult to see how he could do this, unless his argument was premised on a "fruit of the 'privileged' tree" theory. His confession to police clearly was not a therapist-patient communication. See CAL. EVID. CODE § 1012 (West Supp. 1977).

From the evidence the trial court reasonably concluded that the psychotherapist had reasonable cause to believe that Hopkins was "in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication [was] necessary to prevent the threatened danger." Under the circumstances Hopkins held no privilege under the Evidence Code⁸⁶

By changing the criterion for the applicability of section 1024 from "disclosure . . . is necessary to prevent . . . threatened danger" to "disclosure *was* necessary," the *Hopkins* court altered the orientation of the dangerous-patient exception. The use of the exception in *Hopkins* was not for the purpose of preventing harm; rather, it was applied retrospectively to defeat a claim of privilege. Because the therapist had reasonable cause to believe his patient dangerous, and because disclosure *was* necessary to prevent harm, no privilege came into being. That determination was made, not by the therapist, but after the fact by the court. Apparently, the therapist's conclusion was that the patient was not dangerous and that disclosure was unnecessary. He had permitted the patient to travel unescorted in a taxi, and he had made no disclosure. It follows from the *Hopkins* rationale that communications falling within the dangerous-patient exception are not privileged and do not become privileged even when disclosure is no longer necessary to prevent harm. More significantly, the court may determine the applicability of the exception after the fact, even in the face of a contrary determination by the therapist at the time. Herein lies the utility of section 1024 to the *Tarasoff* plaintiff. If his discovery attempts are met with a claim of privilege by the defendant-therapist, the plaintiff can urge that the dangerous-patient exception prevented any privilege from attaching and can request the court to determine whether the privilege or the exception applies.

THE MECHANICS OF DECIDING THE PRIVILEGE ISSUE

The Section 405 Hearing

The resolution of a disputed claim of privilege is made according to the provisions of California Evidence Code section 405.⁸⁷ Section 405

86. 44 Cal. App. 3d at 674, 119 Cal. Rptr. at 64 (1975).

87. CAL. EVID. CODE § 914 (West 1966). *See id.* § 405 comment. The sequence of events which will bring the disputed claim of privilege to a determination under § 405 is as follows: The plaintiff will attempt to make discovery under CAL. CRV. PROC. CODE §§ 2016, 2030, 2031, 2033 (West Supp. 1977). The defendant-therapist will refuse the plaintiff's discovery on the ground that the matter sought is within the therapist-patient privilege. The plaintiff will move under *id.* § 2034(a) to compel the defendant to allow discovery. At the hearing held pursuant to the provisions of § 2034(a), the privilege question will be decided, as required, according to the provisions of CAL. EVID. CODE § 914(a) (West 1966), which stipulates that the procedure to be used in such a determination is *id.* § 405 (West 1966).

requires that a party claiming a privilege has the burden of establishing its applicability. A party opposing a claim of privilege must show the pertinence of an exception.⁸⁸ Assuming the defendant-therapist has evidenced preliminary facts showing the existence of the therapist-patient privilege, the *Tarasoff* plaintiff must persuade the trial judge that the dangerous-patient exception is applicable.

Generally, the trial judge may not require disclosure of information claimed to be privileged in order to rule on the claim.⁸⁹ However, when the applicability of the therapist-patient privilege depends on the content of the therapist-patient communications, *Lifschutz* enables the trial judge to require that the contents be revealed to him.⁹⁰ The trial judge must take precautions to protect the confidentiality of the communications.⁹¹ In *Tarasoff* situations where the defendant-therapist has claimed the privilege and the plaintiff is attempting to establish the exception, the privileged status of the communication depends on its content. Thus, there is no obstacle to access by the trial judge in order for him to rule.

At the inquiry conducted under section 405 into the applicability of the dangerous-patient exception, the trial judge must decide 1) if the therapist had reasonable cause to believe his patient dangerous, and 2) if disclosure was necessary to prevent threatened harm. For practical and policy reasons this two-step analysis should be accomplished in reverse order. The issues will be addressed here in that order.

Disclosure to Prevent Threatened Harm

The foreseeability of injury to the plaintiff should be the threshold question. If the plaintiff was not a foreseeable victim, disclosure could not have been necessary to prevent harm even if the defendant-therapist had reasonable cause to predict dangerousness. The foreseeability issue should be addressed first because it is the easier question and because a negative answer will preclude further inquiry.⁹² Trial judges have much experience with the concept of foreseeability. Furthermore, the question can usually be answered by

88. CAL. EVID. CODE § 405 comment (West 1966).

89. *Id.* § 915(a).

90. 2 Cal. 3d at 437 n.23, 467 P.2d at 571 n.23, 85 Cal. Rptr. at 843 n.23.

91. *Id.*

92. In order for the exception to apply, the therapist must have had reasonable cause to predict dangerousness, *and* disclosure must have been necessary to prevent harm. CAL. EVID. CODE § 1024 (West 1966).

a relatively superficial examination of the putatively privileged communications. If no direct or indirect reference is made to the plaintiff therein, and if no other indication of foreseeability appears, the question will be answered negatively and further inquiry will be unnecessary. The *Lifschutz* court has stated that “[n]ecessary information will often be accessible without delving deeply into specific intimate factual circumstances and such searching probes ought to be avoided whenever possible.”⁹³ If the plaintiff may have been a foreseeable victim and disclosure may have been necessary, the trial judge must proceed to examine the reasonable cause requirement.

Reasonable Cause to Predict Dangerousness

The section 1024 exception will apply only if the therapist had reasonable cause to predict dangerousness. This provision entails some difficulty. If it can be avoided by dealing with the foreseeability issue first, the section 405 hearing will be greatly simplified.

The reasonableness standard might be viewed as a base standard below which the therapist may not fall without risk of liability. If a reasonable person would have predicted violence it seems safe to say that a psychotherapist should also have anticipated it. However, a reasonable lay person might overreact to the patient's behavior. Conversely, there will be cases where a reasonable lay person would not have predicted violence although a psychotherapist should have.⁹⁴ The danger exists that the trial judge, responding as a reasonable “lay” person, will rule according to whether he would have predicted violence, even though professional psychological standards might require a different result. Perhaps the best solution to this problem is an awareness of its existence. Careful attention to the statutory language will prevent the trial judge's perspective from wandering. The exception applies “if the *psychotherapist* has reasonable cause.”⁹⁵ If the trial judge is in doubt whether the information contained in the therapist-patient communications should have given a trained psychotherapist reasonable cause, the issue becomes whether the inadequate expertise of a trial judge in the area of psychological standards can be augmented by expert opinion at the section 405 proceeding.

The Availability of Expert Opinion at the Section 405 Proceeding

The ruling in *Lifschutz* that a trial judge may require disclosure of

93. 2 Cal. 3d at 438 n.25, 467 P.2d at 572 n.25, 85 Cal. Rptr. at 844 n.25.

94. *But see* Ennis & Litwak, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693, 696, 734 (1974), in which it is asserted that psychotherapists are no more expert in predicting dangerousness than laymen and are in fact less accurate predictors.

95. CAL. EVID. CODE § 1024 (West 1966).

putatively privileged communications in order to rule on a claim of privilege when the privilege depends on the content of the communications is basically a recognition that a trial judge cannot do the impossible. He cannot decide the privilege issue rationally while blinded to the information essential to the decision. The trial judge's circumstance in deciding a section 1024 reasonable cause issue is much the same. The trial judge may be asked to make a borderline decision in terms of professional psychological standards without any prior training in psychology. In these cases the *Lifschutz* rationale of permitting the trial judge the informational background necessary to rule should be extrapolated to allow consultation with expert opinion.

Lifschutz allows the trial judge access to information necessary to pass on the privilege issue but admonishes the judge to protect the confidentiality of the communication.⁹⁶ Any disclosure beyond the trial judge might seem at variance with this requirement. However, *Lifschutz* refers to California Evidence Code section 915(b) as a comparable and presumably acceptable procedure for protecting the confidentiality of therapist-patient communications.⁹⁷

Section 915(b) provides that the court may require disclosure "in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege *and such other persons as the person authorized to claim the privilege is willing to have present.*"⁹⁸ The implication is that not only may the trial judge require that the contents be revealed to him, but also, if the defendant-therapist is willing, the trial judge may call on expert opinion to assist him in his determination.⁹⁹

The inquiry at the section 405 hearing as to whether the therapist had reasonable cause to predict dangerousness can be dealt with adequately by a judge with the advice of one or more experts. A preliminary screening of *Tarasoff* complaints by such a panel would

96. 2 Cal. 3d at 437 n.23, 467 P.2d at 571 n.23, 85 Cal. Rptr. at 843 n.23.

97. *Id.*

98. CAL. EVID. CODE § 915(b) (West 1966) (emphasis added).

99. Section 915(b) requires that the therapist must agree to having others present at the determination of the privilege. If the defendant-therapist refuses to allow the trial judge to consult with experts at the § 405 hearing it is debatable whether this refusal can result in an inference against him. *Id.* § 913(a) prohibits any presumption or inference from arising because of an "exercise of privilege"; i.e., "a privilege . . . exercised not to testify with respect to any matter, or to refuse to disclose any matter." At the § 405 inquiry into the existence of the privilege, however, where the contents of the therapist-patient com-

seem to be acceptable to the psychological professions as well as to the individual defendant-therapists. According to the provisions of section 915(b), the defendant-therapist may be present at the section 405 hearing. In his presentation of the therapist-patient communications, the therapist's arguments can be heard *ex parte* in explanation and justification of his course of treatment. The arguments can be analyzed by the court with the assistance of the consulting experts, and a decision can be rendered on an informed basis in view of all the circumstances.

Section 1024 and the Tarasoff Cause of Action

The elements of the dangerous-patient exception are basically the same as the essential elements of the *Tarasoff* cause of action.¹⁰⁰ Thus, the inquiry into whether the privilege or the exception will prevail is also a preliminary inquiry into the merits of the plaintiff's case. This feature of the exception enhances its appropriateness for eliminating unfounded allegations. Section 405, under which the privilege inquiry will be conducted, provides for situations in which "a preliminary fact is also a fact in issue in the action." Section 405 states that in such cases "[t]he jury shall not be informed of the court's determination as to the existence or non-existence of the preliminary fact."¹⁰¹ If the privilege is held to prevail and discovery of the therapist-patient communication is denied, the plaintiff may pursue his action without prejudice. On the other hand, if the exception is held applicable and discovery granted, the defendant-thera-

munication can be required to be disclosed, it would seem that there could be no "exercise of the privilege." The therapist cannot refuse to testify, nor can he refuse to disclose any matter.

The comment to § 913(a), in explaining the purpose of the section, states that if adverse inferences could be drawn from an exercise of privilege "a litigant would be under great pressure to forgo his claim of privilege and the protection sought to be afforded by the privilege would be largely negated." This rationale is inapposite at the § 405 hearing where the confidentiality of the communication is required to be protected in any case. The protection of the privilege will not be negated because one of the purposes of the § 405 inquiry is to preserve this protection against unfounded complaints. Moreover, the comment goes on to say that "inferences which might be drawn would, in many instances, be unwarranted." The likelihood of unwarranted negative inferences being drawn from a defendant-therapist's refusal to permit the trial judge to have expert advice is greatly reduced at the § 405 hearing. Because the confidentiality of the communication is assured, an obstructionist motive on the part of the therapist is more likely than a concern for confidentiality. Practically speaking, it would seem difficult to avoid negative inferences from even a suspicion of such a tactic by a defendant-therapist. If, in fact, a negative inference is drawn and the communications are held not privileged as a result, the therapist is without recourse. Only the holder of the privilege, and not the therapist, can appeal a supposed error in denying a claim of privilege. *Id.* § 918.

100. See note 17 *supra*.

101. CAL. EVID. CODE § 405 (West 1966).

pist will not be prejudiced by a finding of preliminary fact essentially the same as that which the plaintiff will attempt to prove at trial. In effect, the dangerous-patient exception provides a judicial filter through which *Tarasoff* complaints must pass before discovery is allowed of therapist-patient communications.

CONCLUSION

The dangerous-patient exception provides the appropriate vehicle for discovery in suits brought under the *Tarasoff* holding. Although waiver and the patient-litigant exception may be useful to the *Tarasoff* plaintiff, their applicability is uncertain in many cases. The breach of duty exception, despite an apparent expediency, is almost surely inappropriate.

Under the section 1024 dangerous-patient exception a procedure can be devised that will be fair to all parties. The plaintiff cannot be prevented from discovering probative information by an arbitrary claim of privilege; yet he is not given unbridled access to therapist-patient communications. The plaintiff will have the opportunity to have the therapist-patient communications reviewed by a judge to determine if the plaintiff may have been a foreseeable victim of the patient's violent tendencies. If foreseeability is found, the communication can be reviewed by the court advised by experts to determine if there is any evidence of a negligent failure to predict dangerousness. The defendant-therapist will be able to claim the privilege and in good faith object to the plaintiff's discovery. Perhaps even more important from the therapist's standpoint, he will be heard at the section 405 hearing where the privilege issue is decided. As a result of this inquiry, the communications will be held either privileged or within the exception, and discovery will be granted accordingly. Section 1024 seems to work effectively and reliably to the advantage of all legitimate interests. Section 1024 can balance the plaintiff's interest in access to probative information against the defendant's interest in maintaining therapist-patient confidentiality. By interposing informed judicial consideration of the necessity for disclosure between the allegation of negligence and the grant of discovery, the dangerous-patient exception can preclude unwarranted intrusions into therapist-patient confidentiality as well as prevent obstructive claims of privilege.

ALEXANDER J. OLANDER

